these are exclusively in Courts of original jurisdiction, and are therefore, technically speaking, re-arguments rather than re-hearings.

"But, even independently of this distinction, we think the English practice has very little to recommend it. The expenses of litigation, thus prolonged, are oppressive and often ruinous to suitors, and have thrown reproach upon the whole system of Chancery jurisprudence. It would ill become this Court to introduce into their practice a tedious and costly system, which the most eminent of the law reformers in England are, at this very time, doing their utmost to rid themselves of. We cannot afford to employ one term in rehearing cases which have been decided at a previous term. The motion is therefore overruled."

Rhode Island Supreme Court, March, 1852.

MOUNT VERNON BANK *vs.* CHARLES M. STONE.[1]

Where a bill makes charges of fraud which are not established at the hearing, the bill will be dismissed, notwithstanding it states other grounds upon which relief might have been granted, if not blended with the allegations of fraud.

The Mount Vernon Bank was a bank located in Foster, and the defendant was from the 8th of June, 1844, to the 29th of May, 1850, their agent for the purpose of transacting the business of the Bank in the city of Providence, where the plaintiffs provided him with an office and books, to be kept in the office in which to record the business of his agency, and they paid him as such agent, a salary of five hundred dollars per annum. The bill alleged first, that the defendant had not fully accounted and had refused to deliver and exhibit the books of the Bank to the plaintiffs, and in the second place, charged that the defendant fraudulently concealed the said books, fraudulently used the money of the bank, and by fraudulent representations obtained a release or discharge of a portion of said account, and a surrender of the bond given for the faithful discharge of his duties as agent. The bill prayed for a decree for an account, a delivery of the books of the Bank, a sur-

[1] This case will be found in 2 R. I. Rep. 129, printed, but not yet published. We are indebted to Thomas Durfee, Esq., the State Reporter, for the printed sheets of his forthcoming volume.

render of the release obtained from the plaintiffs, and a return of the bond.

The opinion of the Court was delivered by

GREENE, C. J.—The bill in this case alleges the appointment of the defendant as agent of the plaintiffs, and states the business which he was to transact in that capacity. It alleges the purchase of books by the defendant, in which to record the business of his agency, and that such books were paid for by the defendant with the moneys of the plaintiff, and that the books are the property of the plaintiffs. The bill then alleges that the defendant has refused to deliver or exhibit to the plaintiffs, the said books of account, and that defendant has used the money and other property, and credit of the plaintiffs, while acting as such agent, by loaning the same and otherwise, and received therefor divers sums of money, for which he has not fully accounted to the plaintiffs.

The bill then charges as follows, viz.—"That the said Stone fraudulently conceals said books of account from the plaintiffs, and hath removed the same from the office and place of business of said agency founded as aforesaid by the plaintiffs; and that said Stone had received large sums of money belonging to the plaintiffs, and fraudulently retained portions of the same and appropriated the same to his own use and benefit, and that the said Stone in the accounts he has rendered the plaintiffs from time to time, hath made fraudulent representations of his conduct and proceedings, to wit:—among others, that he hath represented that he hath received smaller sums of money for interest, than he did in fact receive as such agent, and by means of such false and fraudulent representations, hath deceived the officers and the agents of the plaintiffs, and hath obtained from them a certain release and discharge of a portion of said account, and surrender of a bond executed by said Stone, for the faithful discharge of the duties of said agency."

The bill, among other things, prays that the defendant may be decreed to surrender and cancel the release and discharge by him, held from the plaintiffs, and to return the bond executed by him and his sureties, for the faithful discharge of his duties in his said agency.

After a careful examination of the evidence in relation to the charges of fraud, we feel bound to say, that the plaintiffs, in our judgment, have failed to prove them ; and the only question which remains to be considered in the cause, is, whether the bill ought to be dismissed or sent to a master for an account, with liberty to the plaintiffs to prove an error or mistake in the settlement which has heretofore been made, and with receipt or release given, and executed by them, and also to prove any matters of claim not embraced by said settlement. This would be the ordinary course of the Court on a bill, by the principal against his factor for an account. The difficulty in pursuing this course in the present case, arises from the charges of fraud contained in the bill.

We think these charges the principal ground of relief set forth in the bill, and we cannot permit the plaintiffs, after having failed to prove the fraud, to fall back on the allegation, that the defendant has not accounted, and has not produced and delivered his books of account, and to treat the case as if no allegation of fraud was made. The rule in relation to this subject is stated by the Court in the case of *Price* v. *Berrington*, (7 Eng. L. & Eq. R. 260.) "When the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff is not entitled to a decree, by establishing some one or more of the facts quite independant of fraud, but which might, of themselves, create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated." And the same principal is recognised in *Farraly* v. *Hobsan*, (22 Eng. Ch. R. 255,) and in *Glaseat* v. *Lang*, (Ibid, 310.)

We think the rule is founded in the highest justice. A plaintiff ought not to be permitted, considering that a Court of Chancery is always open to allegations of fraud, to speculate upon the chances of relief upon that ground, and failing in that, to fall back upon a different ground.

Bill dismissed with costs, without prejudice, except as to the charges of the fraud.

NOTE.—In the subsequent case of Masterstone *vs.* Finnegan the same rule was applied by the same Court. This was a bill in equity for partition of a lot of land,

of small value, in the suburbs of the City of Providence. The parties were both ignorant and illiterate, and had taken their joint deed of the lot to a person, and requested him to write a division of it for them to execute. He wrote a very informal memorandum to this effect upon the back of the deed, and they signed it; but this division did not describe the whole lot, and so a part was left undivided. The plaintiff filed her bill to set aside this partition as being imperfect, informal, and insufficient in law, and as injurious to her, because it left a part of the lot undivided, and of this part the defendant had taken exclusive possesssion of, and claimed it as his own. This the plaintiff denied, and stated in her bill that the above memorandum of division was obtained from her by fraud and imposition of the defendant, as she could not read nor write; and she prayed the Court to set aside the partial partition, and order a new and valid one of the whole lot. The Court were not convinced of the fraud and imposition upon the evidence, nor that the defendant had any exclusive title to the undivided portion of the lot; and consequently dismissed the plaintiff's bill as to setting aside the imperfect partition, (and in fact held that to be valid,) with costs, because the charge of fraud was not proved, and on the authority of the above case of M. V. Bank *vs.* Stone. But they sustained the bill as to the portion of the lot not embraced in the parol partition; but the plaintiff's misfortune in this regard is, that this portion is but nineteen feet wide, and the same decree unfortunately confirms the defendant in his portion under the parol partition, which chances to lie between the plaintiff's portion and the new strip to be assigned to her, nine and a half feet wide. What she *sought* was, to have a new and proper partition of the whole upon any of the grounds of her bill. But from the remarks which fell orally from the Chief Justice, in the case of Whitman *vs.* Holden, &c., at the same term, it would seem the rule established in the two preceding cases is not to be rigidly applied to all cases, but it must depend much on the circumstances of the case at bar; and the Court was understood so far to qualify the preceding cases, as to intimate that the charge of fraud must be gross or wanton, and appear to be made from bad motives, in order to preclude the party making it, from relief on other grounds alleged and sustained in the same bill.—*Reporter's Note.*

Supreme Court of Pennsylvania, December Term, 1852.

DAVID MEKONKEY'S APPEAL.

1. Where one devises all his real estate for life, and all his personal estate absolutely, "having full confidence that his wife will leave the surplus to be divided at her decease justly among her children," the words do not of themselves import a trust, nor will they be so construed without other expressions to control them.
2. Words in a will expressive of desire, recommendation, and confidence, are not words of technical, but of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust; and the old Roman and English rule on this subject is not part of the common law of Pennsylvania.